WAN SENIK WAN OMAR v. MAJLIS PERBANDARAN SELAYANG

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
BADARIAH SAHAMID JCA
MARY LIM JCA
[CIVIL APPEAL NO: B-02(A)-1680-09-2016]
6 JULY 2017

LOCAL GOVERNMENT: *Buildings – Renovation – House owner failed to obtain prior approval from Municipal Council before renovating house – Municipal Council offered compound and discounted compound – House owner paid discounted compound – Municipal Council agreed to approve house owner's application to renovate house subject to consent of neighbours – Municipal Council increased assessment sum of house after taking into consideration illegal structure – Application for judicial review of Municipal Council's decision dismissed by High Court – Whether house owner came to court with clean hands as he had renovated house without prior approval from Municipal Council – Whether Municipal Council legally clothed to demolish illegally renovated structure – Street, Drainage and Building Act 1974, ss. 70(11) & 72(1)*

The appellant, the owner of a cluster house, failed to obtain prior approval from Majlis Perbandaran Selayang ('the respondent') before renovating his house. The respondent issued a notice under s. 70(11) of the Street, Drainage and Building Act 1974 ('the Act') offering to the appellant, a compound of RM12,500 ('the original sum') for the said renovation without the former's prior approval. This was followed by another notice under s. 72(1) of the Act requiring the appellant to demolish and vacate the illegal structure. The appellant later paid RM800 being the compound discounted from the original sum given by the respondent. Pursuant to meetings with the appellant, the respondent agreed to approve the appellant's application to renovate his house subject to the consent of his neighbours. The respondent imposed this condition because one of his neighbours, who was dissatisfied with the renovation works, had (i) lodged a complaint against one of the respondent's officers to the Selangor State Secretary Office; and (ii) threatened that she would pursue the matter to the Chief Minister's Office and Malaysian Anti-Corruption Commission if the respondent did not demolish the illegal structure erected by the appellant. The respondent increased the assessment sum of the appellant's house after taking into consideration the illegal structure. *Via* a notice by the respondent, the appellant was ordered to vacate and demolish the illegally erected part of the appellant's house ('the impugned decision'). Aggrieved, the appellant filed an application at the High Court for judicial review of the impugned decision, seeking, *inter alia*, orders of (i) *certiorari* to quash the impugned decision; and (ii) *mandamus* to order the respondent to decide on the application to renovate the house dated 3 April 2016. The High Court Judge ('the HCJ')

dismissed the application on the grounds that (i) the appellant came to court with unclean hands as he had renovated his house without prior approval from the respondent; and (ii) the respondent was legally clothed by s. 72(1) of the Act to demolish the illegally renovated structure. Hence the present appeal.

Held (allowing appeal; setting aside decision of High Court)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) The appellant had already paid the compound for the offence of renovating his house without the required approval from the respondent. From the original sum, the final amount of compound to be paid was RM800. The respondent accepted the payment by the appellant. The effect of paying a compound would be similar to an acquittal in the sense that the appellant could not be charged for the same offence again in the future. When the appellant filed the application for judicial review of the impugned decision, it would be erroneous for the HCJ to say that he came to the court with unclean hands based on the understanding of the *ex turpi* rule. (paras 20 & 23)

(2) By offering the negotiated compound which was accepted and duly paid by the appellant, the option to invoke s. 72(1) of the Act was no longer available to the respondent to order the appellant to demolish the illegally erected structure. Furthermore, the original amount of assessment levied against the appellant had included or taken into account the illegal structure in its calculation. By taking the illegally erected structure into account in the assessment rate, the irresistible inference must be that the respondent must have accepted the illegal structure has been approved. The respondent was estopped from further complaining about the illegal structure and requiring it to be demolished when the respondent had acted upon it for its own benefit in raising the assessment rate payable by the appellant. (paras 26 & 27)

Bahasa Malaysia *Headnotes*

Perayu, pemilik rumah berkelompok, gagal mendapat kelulusan daripada Majlis Perbandaran Selayang ('responden') sebelum mengubah suai rumahnya. Responden mengeluarkan notis bawah s. 70(11) Akta Jalan, Parit dan Bangunan 1974 ('Akta'), menawarkan kepada perayu kompaun berjumlah RM12,500 ('jumlah asal') bagi ubai suai tanpa kelulusan responden. Ini disusuli satu lagi notis bawah s. 72(1) Akta yang mengkehendaki perayu merobohkan dan mengosongkan struktur haram tersebut. Perayu kemudian membayar RM800 iaitu diskaun kompaun jumlah asal yang diberi oleh responden. Berikutan mesyuarat dengan perayu, responden bersetuju meluluskan permohonan perayu untuk mengubah suai rumahnya tertakluk pada kebenaran jiran-jirannya. Responden menetapkan syarat ini kerana salah seorang jirannya, yang tidak berpuas hati dengan kerja-kerja ubah suai yang dijalankan, telah (i) mengadu kepada Pejabat Setiausaha

Kerajaan Negeri Selangor tentang salah seorang pegawai responden; dan (ii) mengugut akan memanjangkan hal perkara ini ke Pejabat Ketua Menteri dan Suruhanjaya Pencegahan Rasuah Malaysia jika responden tidak merobohkan struktur haram yang dibina oleh perayu. Responden meningkatkan jumlah taksiran rumah perayu selepas mengambil kira struktur haram. Melalui satu notis daripada responden, perayu diperintahkan mengosongkan dan merobohkan bahagian rumah perayu yang dibina secara haram ('keputusan yang dipertikai'). Terkilan, perayu memfailkan permohonan di Mahkamah Tinggi bagi semakan kehakiman keputusan yang dipertikai, memohon, antara lain, perintah (i) *certiorari* untuk membatalkan keputusan yang dipertikai; dan (ii) *mandamus* untuk memerintahkan responden memutuskan permohonan mengubah suai rumah bertarikh 3 April 2016. Hakim Mahkamah Tinggi menolak permohonan atas alasan (i) perayu hadir ke mahkamah 'bertangan kotor' kerana dia telah mengubah suai rumahnya tanpa terlebih dahulu memperoleh kelulusan responden; dan (ii) responden diberi kuasa oleh s. 72(1) Akta untuk merobohkan struktur tersebut yang diubah suai secara haram. Maka timbul rayuan ini.

Diputuskan (membenarkan rayuan; mengetepikan keputusan Mahkamah Tinggi)
Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Perayu telah membayar kompaun bagi kesalahan mengubah suai rumahnya tanpa kelulusan responden. Daripada jumlah asal, jumlah terakhir kompaun yang perlu dibayar ialah RM800. Responden menerima bayaran perayu. Kesan membayar kompaun sama dengan pelepasan iaitu perayu tidak boleh dipertuduh bagi kesalahan sama pada masa akan datang. Apabila perayu memfailkan permohonan semakan kehakiman keputusan yang dipertikai, adalah khilaf oleh HMT untuk menyatakan bahawa perayu hadir ke mahkamah 'bertangan kotor' berdasarkan pemahaman peraturan *ex turpi*.

(2) Dengan menawarkan kompaun yang dirunding yang diterima dan dibayar oleh perayu, responden tidak lagi mempunyai pilihan membangkitkan s. 72(1) Akta untuk memerintahkan perayu merobohkan struktur yang dibina secara haram tersebut. Tambahan lagi, jumlah asal taksiran yang dikenakan terhadap perayu termasuk atau mengambil kira, dalam perkiraannya, struktur haram tersebut. Dengan mengambil kira struktur yang dibina secara haram dalam kadar taksiran, inferens yang boleh dibuat adalah responden menerima bahawa struktur haram tersebut telah diluluskan. Responden diestop daripada mengadu dengan lebih lanjut tentang struktur haram tersebut dan mengkehendaki agar struktur tersebut dirobohkan sedangkan responden, bertindak bagi manfaatnya, telah meningkatkan kadar penilaian yang perlu dibayar oleh perayu.

Case(s) referred to:

Associated Provincial Picture House Ltd v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

Council of Civil Service Unions v Minister for the Civil Service [1983] UKHL 6 ***(refd)***

Holman v. Johnson (1775) 1 Cowp 341 ***(refd)***

Saunders v. Edwards [1987] 1 WLR 1116 ***(refd)***

Vellino v. Chief Constable of Greater Manchester [2001] EWCA Civ 1249 ***(refd)***

Legislation referred to:

Federal Constitution, arts. 7(2), 13(1)

Street, Drainage And Building Act 1974, ss. 70(11), 72(1)

For the appellant - Anand Suppiah; M/s Anand Suppiah & Co

For the respondent - Nurzali Mohd Taib & Md Khairul Khailani Rakmad; M/s Zahir Khailani

[Editor's note: For the High Court judgment, please see Wan Senik Wan Omar lwn. Majlis Perbandaran Selayang [2016] 1 LNS 1616 (overruled).]

Reported by Najib Tamby

JUDGMENT

Abang Iskandar JCA:

Brief Facts Of The Case

[1] Wan Senik bin Wan Omar ("the applicant") is the owner of a cluster house. His house is in parcel B as shown below:

A	B	E	F
C	D	G	H

[2] Sometime in January 2015, the applicant appointed a contractor to renovate the house. For that purpose, a prior approval from Majlis Perbandaran Selayang ("the respondent") must be first obtained. However, the applicant's contractor failed to obtain the approval.

[3] On 25 February 2015, the applicant had received a notice under s. 70(11) of Akta Jalan, Parit, dan Bangunan 1974 ("Akta JPB 1974") offering a compound of RM12,500 for the said renovation without obtaining the respondent's prior approval.

[4] Later, the respondent had issued a notice dated 11 March 2015 which required the applicant to demolish and vacate the illegal structure under s. 72(1) of Akta JPB 1974.

[5] On 20 March 2015, the applicant paid the compound in the sum of RM800 to the respondent, after a discount was given by the respondent from the original sum of RM12,500.

[6] However, it appeared that it was not the end of the matter. Subsequently, pursuant to two meetings the appellant had with the Respondent's representative dated 4 August 2015 and 27 October 2015 respectively, the respondent agreed to approve the applicant's application to renovate his house subject to the consent of the neighbours from his cluster group and the house owners in the adjacent cluster group.

[7] Owners of parcels A, C, and D consented to the renovation but not the owner of parcel E of the adjacent cluster. She refused to give her consent as she was having personal problems with the applicant.

[8] The respondent's representative had imposed the condition to obtain consent from the neighbours due to an action taken by the owner of parcel E who was dissatisfied with the renovation works. She had lodged a complaint against one of the respondent's officers to Pejabat Setiausaha Kerajaan Negeri Selangor and had further threatened that she would pursue the matter to the Chief Minister's Office and Suruhanjaya Pencegahan Rasuah Malaysia ("SPRM") if the respondent did not demolish the illegal structure erected by the applicant.

[9] On 26 February 2016, the respondent increased the assessment sum of the applicant's house after taking into consideration the illegal structure.

[10] *Vide* notis "mengosongkan dan meruntuhkan bangunan rumah No 59, Jalan 6/17, Bandar Tasik Puteri, 48020 Rawang, Mukim Rawang, Daerah Gombak, Selangor Darul Ehsan" dated 2 March 2016 ("the said decision") the applicant was ordered to vacate and demolish the illegally erected part of the applicant's house. This said decision can be seen at p. 84 of the record of appeal.

[11] Aggrieved by the said decision, the applicant filed an application for leave for judicial review ("JR") for among others, an order of *certiorari* to quash the respondent's said decision dated 2 March 2016 and an order of *mandamus* to order the respondent to decide on the applicant's application to renovate the house dated 3 April 2016.

[12] The High Court Judge had dismissed the applicant's application, thus this appeal by the applicant to the Court of Appeal.

The Appeal

[13] We heard this appeal on 23 February 2017 and unanimously allowed the appeal with costs. We also set aside the decision of the learned High Court Judge dated 5 August 2016. These are now our grounds having so decided.

[14] The applicant contended in his submission that the said decision had caused double jeopardy against him and he had been deprived of his right guaranteed under arts. 7(2) and 13(1) of the Federal Constitution. This is because the applicant had paid the compound and thus cannot be punished for the second time for the very same offence.

[15] The other complaint by the applicant before us is that the respondent's order does not comply with s. 70(11) of Akta JPB 1974 when it failed to obtain the order from the Magistrate's Court beforehand. Section 70(11) of Akta JPB 1974 provides:

> Any person who makes any alteration to any building otherwise than is provided for in this Act or by-laws made thereunder or without the prior written permission of the local authority shall be liable on conviction to a fine not exceeding twenty-five thousand ringgit and a Magistrate's Court shall, on the application of the local authority, issue a mandatory order to alter the building in any way or to demolish it.

[16] The third issue raised by the applicant is that the respondent had taken into consideration irrelevant factors in arriving at its decision, particularly the complaint and threat by the owner of parcel E.

[17] Last but not least, the applicant contended that basically the respondent had agreed to the renovation works done by the applicant when it increased the assessment which had taken into consideration the illegally erected part of the house. The respondent now thus, is estopped from requiring the same to be demolished.

[18] On the respondent's part, the respondent contended that the applicant had failed to obtain approval from the respondent before renovating the house. The second issue is that, the neighbour at parcel E is affected by the renovation works done by the applicant. The respondent also submitted that the approval from the respondent is still needed even after paying the fine. After all, in this case, the respondent had never given any approval to the applicant to renovate the house.

[19] The learned High Court Judge had dismissed the application for JR on two grounds, namely that the appellant had come to court with unclean hands. His hands were unclean because he had done the house renovation without the required prior approval having first been obtained from the respondent. The other ground for the dismissal being the fact that the respondent was legally clothed by the provisions under s. 72(1) of Akta JPB 1974 to require the appellant to demolish the illegally renovated structure at the appellant's house.

Our Findings

[20] Having considered the submissions put forward on behalf of both parties, we had decided in favour of allowing the appellant's appeal. Essentially, we were of the view that the finding by the learned High Court Judge that the appellant had come to court with unclean hands was erroneous. The concept of unclean hands was one that was founded upon equity. The principle derives originally from the judgment of Lord Mansfield in *Holman v. Johnson* (1775) 1 Cowp 341, in which it was said that 'no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act'.

[21] Learned Justice Bingham LJ (as he then was) in *Saunders v. Edwards* [1987] 1 WLR 1116 overlaid the principle with the following gloss: A

> Where the claimant's action in truth arises *ex turpi causa* he is likely to fail. Where the claimant has suffered a genuine wrong to which the allegedly unlawful conduct is incidental, he is likely to succeed.

[22] It has its genesis in the Latin maxim of *ex turpi causa non oritur actio*, which essentially means that a right cannot arise from a wrong. In essence, the underlying jurisprudence is that the court ought not to be aiding such a litigant. Subsequent development of the law has led to the principle that a man should not benefit by his own wrong (see, the case of *Vellino v. Chief Constable of Greater Manchester* [2001] EWCA Civ 1249 per Sir Murray Stuart-Smith). B C

[23] From the facts of this case, the appellant had already paid the compound for the offence of erecting the structure in renovating his house without the required approval from the respondent. There were negotiations regarding the amount of compound to be paid. From RM12,500 the final amount of compound to be paid was RM800. The respondent accepted the payment by the appellant. The effect of paying a compound would be similar to an acquittal, in the sense that the appellant cannot be charged for the same offence again in future. When he filed the application for JR of the said 2 March 2016 decision of the respondent, clearly it would be erroneous to say that he comes to court with unclean hands in the sense of our understanding of the *ex turpi* rule. D E

[24] This brings us to the second ground of dismissal by the learned High Court Judge where he had adverted to the fact that the respondent had the legal authority under s. 72(1) to require the demolition of the illegal structure. Section 72(1) provides: F

> (1) Where the local authority is satisfied that a building has been erected or is in the course of erection or is about to be erected in contravention of section 70 or, if such building has been erected prior to the coming into force of this Act, in contravention of any law then in force relating to buildings and in respect of which building approval under any law was not given subsequently, the local authority may by notice served on the owner of the land require him to do any one or more of the following acts: G
>
> (a) to abstain from commencing or proceeding with the erection of such building; H
>
> (b) to demolish such building within such time as the local authority may specify; and
>
> (c) to take steps as may be ordered by the local authority.

[25] Granted that the respondent was indeed so clothed with the authority, its exercise must be justified by the factual circumstances before such power may be invoked. In the context of this appeal, the appellant was offered a I

compound which he had paid. If he had not paid the compound, he would have been charged under s. 70(11) Akta JPB 1974 and on conviction, the court shall on application by the respondent issue an order to demolish the illegal structure.

[26] We were of the view that by opting to offer to compound the offence, the respondent had decided not to pursue the matter of demolition of the illegal structure. Had the respondent not offered the compound to the appellant, the invocation of s. 72(1) would still be available at its disposal. But, by offering the negotiated compound which was accepted and was duly paid by the appellant, the option to invoke s. 72(1) of Akta JPB 1974 was no longer available to the respondent to order the appellant to demolish the illegally erected structure.

[27] Then there was the fact that the original amount of assessment that was levied against the appellant had included or taken into account the illegal structure in its calculation. Why should the illegal structure be included in the assessment rate that was levied against the appellant? By taking the illegally erected structure into account in the assessment rate, the irresistible inference must be that the respondent must have accepted the illegal structure has been approved. Learned counsel for the respondent was not able to give any justification as to why that was so when we addressed that question for his response. In the circumstances, it was only reasonable for the appellant to say that the respondent was estopped from further complaining about the illegal structure and requiring it to be demolished when the respondent had acted upon it for its own benefit in raising the assessment rate that was payable by the appellant.

[28] The law on JR is rather trite. Case law authorities have developed, by leaps and bounds, in this important area in the public law sphere. It is now beyond dispute that a decision made in exercise of public duty or function is susceptible to be quashed on recognised grounds by way of a JR application, as enunciated by Lord Diplock in the celebrated House of Lords decision in the case of C*ouncil of Civil Service Unions v. Minister for the Civil Service* [1983] UKHL 6 ("the *CCSU* case"). The learned Law Lord had opined as follows:

> Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action are subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in the course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community ...

[29] The ground of challenge premised on 'illegality' would encompass the complaints challenging the legality of the decision-maker's decision. In the *CCSU* case (*supra*), Lord Diplock had confirmed that:

> … by illegality as a ground for judicial review I mean that the decision -maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question.

[30] Premised on the above, it was clear that the notice issued under s. 72(1) Akta JPB 1974 was without legal basis. One of the accepted principles of JR is that an impugned decision is susceptible to be quashed if it is one that is grounded on an illegality. *Wednesbury* unreasonableness is another ground to strike down an impugned decision (see the case of *Associated Provincial Picture House Ltd v. Wednesbury Corporation* [1948] 1 King's Bench 223 per Lord Greene MR). The respondent had acted unreasonably in this case given the factual matrix which was not seriously in dispute.

[31] To our minds, this appeal was one such situation where our appellate intervention was required to correct a patent wrong.

[32] Based on the above reasons, we allowed the appeal with agreed costs of RM2,000 subject to payment of allocator fees. The decision of the learned High Court Judge dated 5 August 2016 was set aside. We granted prayer (1) in the JR application. The deposit was refunded to the appellant.